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In the Supreme Court
of the United States

OCTOBER TERM, 1959

No. 691

REYNOLDS METALS COMPANY, a corporation,
Petitioner,

v.

PAUL MARTIN and VERLA MARTIN, husband and wife,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents submit the following, as permitted by Rule 24, in opposition to the granting of the petition for a writ of certiorari.

THE FACTS

This case involves nothing more than an award of damages for injury caused by petitioner's tortious conduct. Petitioner [defendant in the trial court; appellant in the Oregon Supreme Court] spilled forth from its factory tons of poisonous fluoride compounds, which settled upon the near-by lands of respondents, poisoned

the forage thereon, and prevented use of the land for grazing cattle.

The trial court awarded respondents damages. The Oregon Supreme Court affirmed. A petition by petitioner for a rehearing was denied.

STATUTE OF LIMITATIONS

Petitioner states, "the ultimate question involved in this case is whether the two or the six year statute of limitations is applicable." (Petition for Writ, p. 17.)

The question of whether recovery was limited to recovery for the damage occasioned within two years before the commencement of the action was never raised in the trial court by demurrer, pleading, motion or otherwise, and was not an issue between the parties required to be passed upon by the Oregon Supreme Court. This question could have become important only if it had been made an issue in this particular case, but even so would have been only a matter of local law.

Continuously between August, 1951 and January, 1956, petitioner, in the operation of its factory, emitted each day some 800 pounds of these poisons, and toxic quantities were deposited upon plaintiffs' land (Petition for Writ, p. 37). Under the circumstance of this continuous course of tortious conduct, the statute of limitations (whichever might be applicable) commences to run only when the exposure ceases. The Oregon Supreme Court in this case had no occasion to consider or discuss this rule of law, but it is the settled rule in Oregon. Rey-

nolds Metals Co. v. Yturbide (C.C.A. Ninth Circuit 1958), 258 F. 2d 321, certiorari denied, 358 U.S. 840, 79 S. Ct. 66; Shives v. Chamberlain, 168 Or. 676, 126 P. 2d 28; Hotelling v. Walther, 169 Or 559, 130 P. 2d 944. See also Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018.

FEDERAL QUESTION

Petitioner claims that federal questions, here sought to be reviewed, were raised in the Oregon Supreme Court in a petition for rehearing, and that somehow refusal of the Oregon Supreme Court to rehear the case deprives petitioner of the equal protection of the law.

Under Rule 23(f) petitioner must specify the manner in which the federal question sought to be reviewed was raised. Does the petition for rehearing in the Oregon Supreme Court raise any federal question?

This petition for rehearing (which is in the record in this Court) names four "particulars" in which the court is said to have "erred." In summary they are:

1. The opinion of the Oregon Supreme Court contains an erroneous definition of the tort of trespass.

2. The Oregon Supreme Court should have held petitioner guilty at most of conduct constituting a nuisance.

3. The Oregon Supreme Court in its opinion placed an erroneous construction upon its opinion in an earlier case (1948).

4. The result of the opinion would place a burden on "all segments of the population" and in particular (A)

upon industries functioning in the national defense program; (B) upon industries such as steel, fertilizer and lumbering; and (C) upon a householder permitting "any particulate" to be carried through the air "from his own to an adjoining freehold."

Considering particulars 1 and 2, we need only mention that the describing of a tort committed by petitioner as a trespass rather than a nuisance does not deprive petitioner of property without due process of law. Affirming a proper, just and correct judgment of a trial court with the use of wrong or inapt phrases in an opinion harms no one, and raises no constitutional issue. The Oregon Supreme Court said (Petition for Writ, p. 36) that the trial court was not "mistaken in identifying the defendant's invasion of the plaintiffs' land as a trespass." However the invasion with these poisons might be characterized, liability for the damage occasioned thereby follows under Oregon law. Mendenhall v. Water Company, 27 Or. 38, 39 P. 399; Roots v. Boring Junction Lumber Co., 50 Or. 298, 92 P. 811, 94 P. 182; Matthews v. Chambers Power Co., 81 Or. 251, 159 P. 564; Kesterson v. California Oregon Power Co., 114 Or. 22, 228 P. 1092; Huber v. Portland Gas & Coke Co., 128 Or. 363, 274 P. 509; Brown v. Gessler, 191 Or. 503, 230 P2d 541; Bedell v. Goulter, 199 Or. 344, 261 P. 2d 842; Ure v. United States, 93 Fed. Supp. 779 (reversed on other grounds, 225 F. 2d 709).

Neither does an erroneous construction of an opinion in some other case between other parties deprive a person of any constitutional right. The judgment against petitioner in this case should have been affirmed (as it

was) whether the Oregon Supreme Court referred to or mentioned in its opinion any earlier cases or whether it did not, or whether it even wrote any opinion or not.

As to the fourth particular, it seems superfluous to remind this Court that industrial corporations remain liable for their torts whether they be aluminum factories, steel plants or fertilizer manufacturers. Paying for damage occasioned by tortious activities may be painful or distasteful, but there is no constitutional shield against being compelled to do so.

CONCLUSION

The only pretended federal question, here presented, is a question such as could just as well have been raised in the trial court and reviewed by the Oregon Supreme Court. The question, if otherwise of any validity, was not raised at "the first opportunity." Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673. The claim is furthermore without merit. Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358.

It is respectfully submitted that there is no substantial federal question presented for review, and that the petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE W. MEAD,
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1211 Public Service Building,
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CERTIFICATE OF SERVICE

I, George W. Mead, one of the attorneys for Respondents herein and a member of the bar of the Supreme Court of the United States, hereby certify that on the day of February, 1960, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon the Petitioner, Reynolds Metals Company, by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record, as follows:

To Gustav B. Margraf and W. Tobin Lennon, Reynolds Metals Building, Richmond, Virginia, they being Counsel for Petitioner and that being their post-office address; and by delivering copies thereof at the office of King, Miller, Anderson, Nash & Yerke, and Frederic A. Yerke, Jr., in the American Bank Building, Portland 5, Oregon, they being the Attorneys for Petitioner.

Dated at Portland, Oregon, this day of February, 1960.

GEORGE W. MEAD,
Of Counsel for Respondents.